No. 4028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES C. DAVIS, Director General of Railroads, as Agent, pursuant to Section 211, Transportation Act, 1920,

Plaintiff in Error,

vs.

R. D. ADAMS,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Upon Writ of Error to the United States Circuit Court of Appeals, for the Ninth Circuit.

KEYES & ERSKINE,
Attorneys for Defendant in Error.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF FACTS.

As the plaintiff in error and the defendant in error were the plaintiff and defendant respectively in the lower court we will hereafter refer to them as "plaintiff" and "defendant".

On November 2, 1918, the defendant and shipper delivered to the plaintiff as carrier a car load of chrome ore. This ore was placed on Erie car No. 51,611. An order bill-of-lading was issued to the shipper as consignee with the words "Notify

Midvale Steel & Ordinance Company'' written thereon. The destination of this car was Coatesville, Pa. It was purchased by the Midvale Steel & Ordinance Company from E. C. Humphreys Co., who in turn had purchased it from the defendant who was the shipper. It arrived at its destination on December 9, 1919. Before its arrival the defendant had sent to E. C. Humphreys Co., the order bill-of-lading with a draft for the purchase price of the car attached. E. C. Humphreys Co., paid the draft and received the bill-of-lading and at the time of the arrival of this car were the owners thereof and in possession of the bill-of-lading. At or about the same time the defendant shipped two other cars known as Pennsylvania 294001 and Pennsylvania 825285 to the Midvale Steel & Ordinance Co., at the direction of E. C. Humphreys Co. These two cars had also been sold by defendant to Humphreys Co. The method used in connection with said last two mentioned cars was the same method used in respect to Erie car No. 51611. When these two cars reached the Midvale Steel & Ordinance Co., at Coatesville, Pa., it rejected them and refused to accept delivery thereof. On January 2, 1919, the railroad notified the defendant of the arrival of Erie car No. 51611 at its destination and of the refusal of the Midvale Steel & Ordinance Co. to take the car and asked the defendant to give it the disposition of the car. (Tr. p. 22.) In answer to that letter the defendant wrote to the plaintiff on January 8th, as follows. (Tr. p. 23.) (We take

the liberty of quoting the letter in full because it has a vital bearing in support of our contentions):

"January 8, 1919.

United States Railroad Administration,
Broad Street Station,
Philadelphia, Pa.
Gentlemen:

Replying to your letter File No. G 30, Desk 1, in reference to Car Erie 51611, chrome ore shipped by us to the E. C. Humphreys Company, *beg to advise that they have purchased this car from us and we have delivered the bill of lading to them. This was an order bill of lading shipment and we cannot at present take up the matter of disposition of the car without the bill of lading.*

For your information will state that we have no place we can dispose of this car outside of the destination it is at present and *would suggest that you take the matter up with the E. C. Humphreys Company.*

Yours very truly,
Adams & Maltby
By C. S. Maltby."

This letter it is admitted was received. It shows that the railroad was notified that E. C. Humphreys Co. was the owner of the car, held the bill of lading and that therefore the defendant could make no disposition of the car whatsoever and the plaintiff was referred to E. C. Humphreys Co., the owner of the car. It is claimed that the subsequent actions of Humphreys & Co., the purchaser of this car, bound the defendant because E. C. Humphreys Co. was acting as agent for the defendant. *Here is a clear and unequivocal notice*

to the railroad on January 8, 1919, before the storage charges sued for had accrued, that E. C. Humphreys Co. was not the agent of the defendant but was the purchaser of the chrome ore in the car and the owner thereof. After this notice the railroad could not claim that it dealt with Humphreys as the agent of the defendant.

The reference in the stipulation of facts to the lack of knowledge of the plaintiff of the arrangement between Adams and Humphreys Co., and of the payment by Humphreys Co. to Adams for this car of chrome refers only to that which occurred prior to the 8th of January, 1919. On that date, as we see from the foregoing letter, the plaintiff was notified by the defendant that Humphreys Co. had purchased the car and was the owner of it and of course thereafter it had knowledge of the facts. The paragraph in the stipulation stating that it had no knowledge obviously means that it had no knowledge prior to January 8, 1919. Counsel in his brief keeps referring to the lack of knowledge of the plaintiff of the transaction between Humphreys Co. and Adams. We admit that the plaintiff knew nothing about it until January 8th, but after January 8th when it was notified in writing of the exact situation, thereafter it had knowledge and it dealt with Humphreys Co., with full knowledge that Humphreys Co. had purchased the car and that the defendant had no further control over it.

After this notice was received the railroad took the matter up with E. C. Humphreys Co., and on the 13th of January, 1919, without the knowledge or consent of the defendant and without defendant being advised thereof or being a party to the arrangement, one Reinhardt representing the E. C. Humphreys Co., requested the railroad to unload and store the chrome ore in Erie car No. 51611 and in the two other cars. The railroad at the request of Humphreys unloaded and stored this material. Humphreys then attempted to sell the material in these three cars. He was successful with respect to the other two cars, sold them in March, 1919, ordered the railroad to ship them to the parties designated by him and the railroad did so. (Trans. pp. 25 and 26.) Humphreys Co. continued its efforts to sell at a price *satisfactory to it* the ore from Erie car 51611 *and requested the railroad to keep the ore in storage* pending these efforts. (Trans. p. 26.) Humphreys Co. was unable to sell this ore, *and so it remained on storage at Humphreys' request until the 16th of June, 1919, over six months after its arrival at its destination.*

STORAGE CHARGES ACCRUING UNDER CONTRACT BETWEEN HUMPHREYS AND PLAINTIFF TO WHICH DEFENDANT WAS NOT A PARTY ARE NOT PART OF OR INCIDENTAL TO FREIGHT CHARGE AND ARE NOT CHARGEABLE TO DEFENDANT.

This arrangement for the storage of this carload of ore for a period of over six months, so as to

enable Humphreys Co. to effectuate a sale thereof was a separate and distinct arrangement between Humphreys and the railroad. *It was an entirely new and separate contract, made without the knowledge of the defendant to which he was not a party with which he had nothing to do and by which he should not be bound.*

It is apparent from counsel's brief that he misunderstands defendant's position. Defendant has always admitted that as shipper and consignor of this chrome ore he was liable for freight charges thereon. In our briefs in the lower court we admitted that the shipper was liable for freight and demurrage charges. We do not and have never questioned this rule. We contend however, *that when the plaintiff knowing that E. C. Humphreys Co. was the owner* of the ore made a separate contract with Humphreys Co. to store the ore for Humphreys Co. until the latter could sell and dispose of the ore and *storage* charges accrued under that *separate contract that defendant is not liable for such storage charges merely because he was the original shipper of the goods.* The lower court has held defendant liable for the *unpaid portion of the freight and demurrage charges* on these goods but it very properly refused to hold defendant liable *for over six months storage* charges accrued under a separate arrangement made on January 8, 1919, between the plaintiff and Humphreys Co., the owner of the goods.

On January 8, 1919, defendant notified plaintiff that Humphreys was the owner of the goods and to look to Humphreys. Plaintiff was told that defendant would have nothing to do with this ore and would give no direction concerning it. With this knowledge defendant enters into a new arrangement with Humphreys to store the ore for over six months while Humphreys tried to sell it. Of this arrangement defendant had no knowledge, was not a party to it and had nothing to do with it and yet it is now claimed that defendant should pay the charges accrued *(not under the original affreightment)* but under this entirely new arrangement made *when the affreightment had terminated.*

The contention that the shipper is liable for the transportation charges does not meet *the proposition that he is* NOT LIABLE FOR CHARGES *accruing under a separate contract between the carrier and the owner of the goods after the affreightment has ended.* Cases cited in favor of such a contention do not disprove such a proposition. On January 8, 1919, plaintiff knew defendant would not pay the freight and demurrage charges. Under Federal Order 34A (Trans. p. 36) it could have *stopped the accrual of further charges* by selling this ore "without further notice sixty days from date of arrival", which would have been February 8, 1919. Instead at the request of Humphreys, and by a separate agreement with that company,

it kept these goods stored over six months and now asks defendant who was not a party to or benefited at all by this arrangement, to pay for this storage. When plaintiff ascertained on January 8, 1919, that defendant would not pay the charges on this ore it was bound to do everything in its power to reduce and diminish the damages. It could not run them up and expect to hold defendant for the unwarranted excess, especially when this excess was incurred under a new contract with the owner of the goods and without the knowledge, privity or consent of the defendant.

See

Norfolk & S. R. Co. v. New Bern Iron Wks., 90 S. E. 149 (hereafter quoted).

We admit that the word "transportation" includes all services *incidental* to the handling of freight *including storage,* but it does not include storage *that is not incidental to the original affreightment and that* arises out of a separate arrangement between the owner of the goods and the railroad.

We can see how absurd the contention is, that all charges against the goods no matter at whose request and when accrued are part of the original affreightment for which the shipper is liable, if we apply such a rule to instances that might arise.

Suppose Humphreys Co. had ordered the railroad to re-ship the car to New Orleans or to store

the ore in a bonded warehouse, or to treat it to save it from destruction or to incur some other expense in connection with it and that the railroad had followed this order, knowing Humphreys Co. to be the owner of the ore and without the knowledge and consent of the shipper and without his being a party to the arrangement, it could not possibly be claimed that the shipper would be liable for these additional charges. Now the storage charges here claimed are in the same category as the instances just cited. Suppose instead of having stored the ore for six months at the request of Humphreys and without defendant's knowledge or consent, it had stored it for five years. Could it be claimed that defendant as original shipper would be liable for these storage charges? Could it be claimed that they were incidental to the original affreightment and part of the transportation charges. The statement of the proposition furnishes its own refutation. There is no difference in principle between over six months and five years. *As soon as the new arrangement for storage was perfected between plaintiff and Humphreys on January 8, 1919,* then the subsequent accruing storage charges arose under that contract and not as incidental to the original affreightment.

When the defendant told the railroad that it did not own the ore, that is could not dispose of it and that it could not give any instructions to dispose

of it and that E. C. Humphreys was the owner of it and then the railroad at the request of Humphreys stored the ore for over six months for the benefit of Humphreys, it made an entirely new contract with Humphreys for which the defendant can in no wise be liable.

While there is very little authority on this question the cases which we have found which are at all in point sustain this proposition.

In *Elliott on Railroads,* Section 1559, in a note in the second Edition on page 334, under Section 1559, after citing cases showing that the consignor is primarily liable for the freight, Elliott says:

> "As shown in some of the cases, however, the carrier may forfeit the right against the consignor *by making a new contract with the consignee or the like.*"

In *In re Arlington Hotel,* 88 Atl. 196 (Dela.), the question was whether or not the owner of the steel which was shipped by the plaintiff should pay the storage charged accrued after four months storage which storage was ordered by the consignee of the goods. It appeared from the evidence that the consignee was a builder who had agreed to construct a building for the hotel company and the hotel company had agreed to furnish to him the materials for the construction at the building. The builder was simply to erect a hotel with material furnished at the site by the hotel company. The court says:

> "But the question at issue is not how much the charges should be but who is now liable for the payment of them. In other words the point to be determined is not how much is due but who is the person liable for the payment of what is due."

In determining whether the shipper was liable for the storage charges as distinguished from the freight or whether the consignee who ordered the storage for three or four months was liable, the court said:

> "From testimony of witnesses produced by the railroad company it appeared that it was arranged between the railroad company and the consignee (the builder) that the structural steel should be stored at a particular yard and in a certain manner to suit the convenience of the builder, and that it should be left there for a period of three or four months. * * *
>
> It does appear from the testimony produced by the carrier, that there was an arrangement between the consignee the builder, as to the storage of the steel, and neither the Arlington Hotel Company, nor the receiver, are connected by any evidence with that arrangement. There is, moreover, ample evidence to show that the carrier did not look to the Arlington Hotel Company, or the receivers, for payment of the charges. * * * Inasmuch as the carrier had already made some contract with the builder respecting the storage of the steel, the terms of which it declined to show, and had accepted from the owner a sum for demurrage charges and for other charges and did not file any claim in the receivership in the District of Columbia, *it is a fairly deducible inference that the carrier then looked to the consignee, the builder, and*

> *not the owner for payment of the other charges,* viz., *those for unloading and storage.* It is urged by the carrier that the builder was acting as agent of the owner, and, therefore, the latter was liable. There were some general statements in the evidence as to some kind of an agency between the builder and owner, but whether or not the agency extended to the making of a contract concerning storing the steel is not shown. But assuming that there was in fact such an agency, *it still was not shown by the carrier, who is bound to show it, that the builder made as agent for the owner a contract as to storage, and not on its own account. There is surely no reason to prevent the consignee from so contracting on its own account and not as agent.* The acts of the carrier and its refusal to prove the real contract made by it with the builder inferentially show that the contract with the builder was not made as agent for the owner, but otherwise.''

The foregoing is a decision to the effect that the consignee can make a separate contract with the carrier with reference to the storage of the goods and that such contract is not binding on the shipper simply because shipper is bound to pay the freight. This case is also authority against the proposition of the plaintiff that when Humphreys Co. ordered the storage of this car it ordered it as the agent of defendant. As the foregoing authority states the consignee can make a separate contract with the carrier and in doing so is not the agent of the shipper.

The case of *Great Northern Railway v. Hocking* (Wis.), 166 N. W. 41, is somewhat in point. The facts were practically the same as those here. The brick was ordered by the Bailey-Marsh Co. (corresponding to Midvale Steel Company), from the Payne-Nixon Co. (corresponding to Humphreys Co.), who bought from the defendant. The brick arrived and was rejected by Bailey-Marsh Co. Later Bailey-Marsh Co., and Payne-Nixon Co., agreed to pay the freight and demurrage charges and gave a note to the railroad for the same. The note was not paid. The railroad then sued the shipper of the brick. The lower court held that the defendant as shipper was liable for the freight and that even though the consignee and the purchaser from the consignee made a separate agreement with the railroad to pay the freight and demurrage charges and gave a note for the same that the railroad did not waive its claim against the shipper for the freight. The lower court allowed the freight under these circumstances but *it refused to allow the demurrage charges* against the defendant and made a distinction between the freight and demurrage charges and this refusal was upheld by the upper court.

Now our position is supported not only by these authorities but also by reason. *Demurrage and storage charges are entirely separate and distinct from freight. The carrier* earns the freight as a carrier. *It earns the demurrage and storage charges as a warehouse man.* When the liability

as a carrier ends then the liability as a warehouse man begins and the relation then between the warehouse man and the person owning the freight is entirely different from the relation between the carrier and the person owning the freight.

Elliott on Railroads, 3rd ed., secs. 2212, 2304.

Seaboard Air Line v. Shackleford, 63 S. E. 252.

Again the consignor may be liable in many instances for freight where he is not liable for storage charges. For instance he is liable for freight but he is not liable for storage charges where the detention is caused by some other cause.

Pennsylvania Railroad v. Really, 81 Atl. 646;

United States v. Texas Railroad, 185 Fed. 820,

or where the detention on the part of the carrier has been wrongful.

Southern Pac. Co. v. Redding, 43 S. W. 1061;

Hochfeld v. Southern R. Co., 64 S. E. 181.

So we see that the services performed are different, the liabilities are different and that the shipper may be liable for the freight while not liable for the storage.

Now it seems indisputable that where a person is not the owner of the goods and has no control over them he cannot be liable for storage and demurrage charges incurred by the real owner of the

goods *under a separate arrangement between the real owner and the carrier made without the knowledge or consent of the defendant and to which he was not a party.* It seems that to hold him liable for these charges which are separate and distinct from the freight charges, because he is technically liable for the freight charges is highly inequitable and unjust, particularly when the storage which has accrued and which was incurred at the request of the owner of the goods is entirely out of proportion to the value of the goods and the freight and almost double the amount thereof.

It will be noted that the storage charges which it is sought to collect by these proceedings were $1545.06, as compared with $899.01, the freight on the car and $758.66, the value when sold of the ore.

In the case of *Yazoo v. Zemurray,* 238 Fed. 789, the court in discussing the liability of the shipper described it as a technical one and pointed out that *owner of the goods is the one ultimately and equitably bound to pay the freight.* In this respect the court said:

> "However, in deciding the case against the plaintiff, I did so because I was satisfied the railroad could have collected from the consignee if it had sued him; that having elected to collect the freight from the consignee, who was the owner of the fruit and bound to pay the freight ultimately, *it would be inequitable to permit the carrier to change its base and proceed against the consignor, who was only technically liable. Conceding that Zemurray was primarily liable to the railroad because of having made the contract, the mode of shipment was prima facie*

> *notice to the carrier that the shipper had parted with ownership on delivery of the goods to it and that the shipment was for the account of the consignee.* Before suit, the railroad was advised of the actual facts, and property of the consignee subject to execution pointed out. Considering all this, I see no reason to change my opinion."

Similarly we might say here that while defendant was technically liable to pay the freight because he was shipper, Humphreys Co., the owner of the goods, was ultimately and equitably bound to pay this charge. Now when the railroad made a new contract with Humphreys Co., knowing that he was the owner of the goods it could not claim that defendant's technical liability for freight charges covered the charges accruing under this new contract. To hold defendant liable for the storage charges outside of, incurred in a different way and entirely separate from freight charges would be, to use the language of the foregoing quotation "inequitable".

It might be said that the railroad was bound to hold the ore for at least sixty days and therefore that the defendant should pay the storage charges accrued for sixty days. The foregoing authorities cited show that the defendant is not liable *for the demurrage or storage charges when they were incurred at the request of the owner of the ore; that this agreement was separate and distinct from the agreement for freight and that the defendant was not a party thereto and is in no wise liable therefor.*

As this arrangement was made on January 8, 1919, the subsequently accruing storage charges arose out of this arrangement and not out of the original shipment. But assume that they did not and assume that the defendant is liable for the storage charges still the authorities hold that as he immediately refused to give disposition of the car and to pay the freight that plaintiff was bound to exercise its right to sell the car as soon as its obligation to hold it expired under the statute,—this was sixty days after arrival or about February 8, 1919, and under this view of the case, which is the most favorable view for the plaintiff, the defendant is only liable for a small fraction of the storage charge.

This very point was raised in the case of *Norfolk & S. R. Co. v. New Bern Iron Works and Supply Co.*, 90 S. E. 149. There the court said, at page 149:

> "Under our statute, however, the right of foreclosure by sale in case of non-perishable freight is given after six months, and, while this is a state statute, being as it is, a part and in furtherance of the remedy afforded by the law in such cases, we see no reason, in the absence of any interfering regulation by congress or of the interstate commerce commission, why it should not prevail both as to inter and intra state shipments; and, under the recognized principle that both in case of tort and breach of contract an injured party is required to do what business prudence requires to minimize the loss (Tillinghast v. Cotton Mills, 143 N. C. 268; 55 S. E. 621; Railroad v. Hardware Co., 143 N. C. 54, 55 S. E. 422), *we think the plaintiff may not recover for the entire time which*

has elapsed since this shipment was refused, but is restricted to the time when he could have relieved himself of the charge by sale pursuant to statute."

Counsel seems to think that because "the Hepburn Act" says that transportation includes terminal charges such as demurrage, handling and storage and because the shipper is liable for the transportation charges that the shipper is liable for all storage charges against the goods shipped. He claims that the shipper is liable for storage charges no matter how unnecessary the storage is to the original affreightment; however disconnected therefrom; *no matter whether ordered by someone other than the shipper for reasons entirely foreign to the original shipment* and no matter how long the storage continues for the benefit of someone else. According to him if the owner of goods asks the railroad to store them for five years (or for over six months as in this case) and accordingly the railroad does so, without the shipper's knowledge and consent, although it could have disposed of them in sixty days and thus stopped storage charges, that the five years' storage charges can be collected from the shipper. His idea is that the "Hepburn Act" makes the shipper liable for any charges against the goods as long as they remain in the railroad's hands, no matter what other contract and parties intervened. *The "Hepburn Act" does not by terms or by implication impose such a charge on the shipper.* Neither the "Hepburn Act" nor any of the cases

cited by counsel referring to it, including the *Cleveland v. Dettleback* case, have any application to the situation involved in this case. Storage charges, as in this case, unconnected with the original shipment and unnecessary thereto and incurred at the request of another do not come within the purview of that act and those cases and *are not considered in those cases* and the shipper is not liable for such storage any more than he would be on any other implied contract between the owner of the goods and the railroad unconnected with the original transportation of the goods.

Counsel says, they cannot ask Humphrey Co., to pay because it was not a party to the bill of lading. It was the owner of the goods. It is admitted these goods *were stored at its request for six months so it could sell them.* When it asked the railroad to store the goods and the railroad company did so Humphrey Company became liable for the storage charges. An implied obligation of Humphrey to pay these charges arose. Counsel has evidently forgotten the doctrine of "assumpsit". Humphrey Co., was bound to pay for this storage when it ordered it and counsel is mistaken in asserting that the railroad cannot ask it to. This storage is the only amount involved here as judgment has been entered in favor of plaintiff for the unpaid part of the freight, demurrage and handling and for storage up to date of the separate contract between plaintiff and Humphrey Co.

Accordingly we submit that the trial court was correct in determining, that the storage charges accruing under the arrangement between Humphreys Co., and plaintiff on January 8, 1919, could not be charged against defendant, that on that date the plaintiff and Humphreys Co., made a separate contract respecting those charges with which defendant has no connection and that defendant is not bound for charges accruing thereunder. The court found defendant liable for the unpaid portion of the charges accruing up to the time of this new contract between Humphreys Co., and defendant, and we submit that the judgment of the lower court was correct.

REFUSAL TO GRANT MOTION TO STRIKE OUT PARTS OF ANSWER WAS PROPER.

The portion of the answer complained of showed that *Humphreys Co., was the owner of the ore and made the separate arrangement for storage* for over six months which we have heretofore referred to. As the storage charges which plaintiff is trying to collect from defendant accrued under this separate arrangement the defendant is not liable for them. Therefore the existence of an entirely new and different contract to which defendant was not a party under which these charges accrued is a complete defense to this action and accordingly was properly set up as such.

PROCEEDS OF THE SALE OF ORE PAID PART OF THE FREIGHT CHARGES.

Plaintiff now claims that the proceeds of the sale of the ore should have been applied not to the freight charges which accrued first and which constituted the oldest item of the railroads account but to the storage charges which accrued last. Plaintiff makes this claim for the first time on appeal. It did not make this contention before or during the trial in the lower court or in computing the amount of the judgment after the decision of the court.

It will be noted that in its own account as rendered and as kept by it plaintiff applied the proceeds of the sale to the frieght charges (see, Trans, p. 27). This is the way its account reads:

Demurrage at point of origin	$ 12.00		
Diversion at Tuscon, Arizona	2.00		
Freight charges at rate of 84.5 cents per 100 pounds, Clovis, Cal., to Coatesville, Pa.	859.37		
	873.37	War tax	$26.20
Against these charges we credit net proceeds of sale, $758.66, applied	736.38	" "	22.28
Leaving unpaid balance of	136.99	" "	3.92
Additional charges accrued are:			
at Coatesville	130.00	" "	3.90
PRR at Coatesville	110.00	" "	3.30
PRR unloading at Coatesville	7.63	" "	.23
PRR Storage at Coatesville	1290.00		
Total to be collected $1,685.97	$1674.62	" "	11.35

The correct and proper course was to credit the proceeds against the freight charges which had accrued first and were the earliest charges. This natural course the plaintiff followed. It applied these proceeds as they should be applied. *It even stipulated at the trial that this was the way these proceeds had been applied* (Trans. p. 27), and now for the first time it is claiming that this method of application was wrong. This method was right and plaintiff's former acts show that it considered this method of application the correct one. Furthermore having applied this payment in this way it is bound thereby and cannot for the first time on appeal claim a different application.

The decision of the lower court, after holding that the defendant was not liable for storage accrued after January 8, 1919 under the new arrangement between Humphrey Co., and plaintiff said: "it is assumed the parties can segregate the proper items for entry in the judgment". Accordingly the parties computed the amount of the judgment in accordance with the decision. In so computing the judgment both parties agreed to the application of the proceeds of the sale to the freight charges. The plaintiff not only in its own accounting but in computing the judgment adopted this method as the correct one but now it claims it was the incorrect one but assigns no reasons therefor. A court will not interfere with an application of payment made by the parties and in making such application it will consider first the intention of

the parties if such intention is manifest. 2 *Amer. & Eng. Ency. of Law,* p. 447. Now in this case the plaintiff as creditor applied this payment, when received, to the freight. The plaintiff's accounts show that. The account which is quoted by us says: "*against these charges (the freight) we credit net proceeds of sale $758.66 applied*". No clearer manifestation of intention to so apply this payment could be shown. As we have seen the court will not interfere with the application particularly when this was the intention of the parties.

However, not only in plaintiff's accounts were the proceeds of the sale of the ore applied against the freight but also plaintiff so applied it at the time of making up the judgment indicating more than ever that this was the proper application of the payment and that it was the intention of the parties that it should be so applied. We submit under the circumstances that now it is too late to change such an application even if plaintiff was entitled to apply these proceeds in some other way. Plaintiff is not, however, entitled to make any different application. It is an elemental rule that payments are applied upon the oldest items of the account.

See: Section 1479 of the ~~Code of~~ Civil ~~Procedure~~ Code of the State of California;

Coulter v. Hurst, 97 Cal. 290;

2 *Amer. & Eng. Ency. of Law,* 461;

Wendt v. Ross, 33 Cal. 650.

The freight and demurrage charges were the earliest items of the account chargeable against this ore and these proceeds should be applied toward their payment in accordance with the foregoing rule. In fact plaintiff by so doing in the first instance admits that this was the proper rule to follow.

Furthermore the railroad had two liens on these goods. First, the lien for the freight charges arising out of its acts as carrier. Secondly, the lien for storage charges arising from its acts as warehouseman. The lien for the freight charges was the first and paramount one and the proceeds of the sale should be first applied in discharge of this lien.

Again while defendant as between the railroad and himself was liable for freight charges Humphrey & Co., the owner of the goods, was the one ultimately liable to the defendant for the freight charges if the defendant should pay it. Accordingly as between Humphrey and the defendant the defendant was surety and Humphrey was principal. Now if the defendant had paid the freight and terminal charges but not the storage charges he would have immediately become subrogated to the railroad's lien on these goods for the freight. "A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor." Section 2849 Civil Code of California.

Accordingly if the defendant had paid the freight charges it would have been subrogated to the lien on these goods for the freight, could have caused this sale and could have used the proceeds to reimburse him for his payment of the freight. Therefore the goods having been sold by the railroad the defendant as surety is entitled to the benefit of the proceeds thereof and is entitled to have them applied on the obligation on which he is surety. As we have said the lien for freight was the paramount lien and the defendant as surety is entitled to have this lien discharged from the proceeds of the sale before the lien for the storage charges, which is a subsequent lien, can be discharged.

Accordingly we submit that the application of the proceeds of this sale originally made by the plaintiff, adhered to by it in its statement of facts and in computing the judgment in the lower court was the correct one, that this application cannot now be modified or changed, that the proceeds of this sale should be applied, first to discharge the lien for the freight before applied in any respect upon the lien for the storage and that this was what was done and that the judgment in this respect should not be modified.

Dated, San Francisco,
November 7, 1923.

Respectfully submitted,
KEYES & ERSKINE,
Attorneys for Defendant in Error.